IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 7, 2007 at Jackson

STATE OF TENNESSEE v. CAROL DENISE POPE

Appeal from the Criminal Court for Davidson County
No. 2000-A-233 Seth Norman, Judge

No. M2006-02749-CCA-R3-CD - Filed September 19, 2007

The defendant, Carol Denise Pope, appeals the Davidson County Criminal Court's denial of alternative sentencing on her conviction of theft of property valued at more than $10,000 but less than $60,000, a Class C felony. *See* T.C.A. § 39-14-103 (2006) (proscribing theft); *see also id.* § 39-14-105(4) (grading theft by increments of dollar amounts of value). We affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Criminal Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and D. KELLY THOMAS, JR., JJ., joined.

Mike Urquhart, Nashville, Tennessee, for the appellant, Carol Denise Pope.

Robert E. Cooper, Jr., Attorney General & Reporter; Alice B. Lustre, Senior Counsel; Victor S. Johnson, III, District Attorney General; and Paul DeWitt, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant's plea agreement specified a Range I, Class-C-minimum sentence of three years; the parties deferred to the trial court to determine the manner of service.

At the manner-of-service hearing, the State announced that it would rely upon the presentence report, which showed theft convictions in Kentucky and Nevada and a violation of probation in Kentucky.

Dr. Michael Browder, a member of the Board of Directors of the Tennessee Center for Performance Excellence (formerly Tennessee Quality Awards and referred to hereinafter as TQA), testified that TQA is a "nonprofit organization[,] . . . a state-wide program for people in the organizations in Tennessee to perform under the Malcolm Baldridge . . . Assessment Program. It

helps businesses and industries, organizations, Chambers of Commerce, United Way, et cetera ." In 1998 and 1999, the defendant committed theft from TQA that nearly put the organization "out of business." He testified that TQA is funded by private donations.

Jamie Butler testified that he was engaged to marry the defendant's daughter, that the defendant could reside with them in Antioch, and that he would assist her in getting a job at his place of employment.

The defendant testified that since 2002, she had been incarcerated in Kentucky and Nevada. She testified that while in confinement, she earned a degree in business studies. She also identified certificates that she had earned in programs including "Street Readiness" and three modules of "Creating Lasting Family." She testified that she had training in sanitation and custodial practice, automatic office skills, office accounting, and stress management. In the Nevada correctional facility, she worked as a program coordinator for the associate warden. She testified that, while in prison, she initiated a support group, which she called "Sisters in Need," and a prison newsletter, which she called "Women of Conviction."

The defendant testified that she was diagnosed with breast cancer in 2003 and underwent a mastectomy and chemotherapy. She testified that she needed further oncological procedures which were unavailable to her in prison.

She admitted that she embezzled approximately $47,000 from TQA, her employer, in 1998 and 1999. She used the money to "live on" and to take care of her two daughters; one of the daughters was a single parent, and the other was preparing to go to college.

She testified that, although she was convicted in Nevada of a 1996 forgery and in Kentucky of a 1995 theft, she had used her confinement to rehabilitate herself, that she was ready to pay restitution installments, and that she accepted "full responsibility for what [she] did." She testified, "I'm a changed person since those four years. I truly am . . . ."

On cross-examination, she admitted that she had stolen approximately $100,000 from her employer in Nevada and that she committed a similar type of theft in Kentucky.

Following the testimony and argument of counsel, the trial judge commented, "What I'm looking at here is a third offender that has absconded from probation . . . ." The court ordered the defendant to serve the three-year sentence in the county workhouse. The defendant appealed and claims that she should have been allowed to serve her sentence in a manner other than via continuous incarceration.

When a defendant challenges the manner of service of a sentence, this court generally conducts a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2003). This presumption, however, is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all

relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id*. If the review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, even if we would have preferred a different result. *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In the event the record fails to demonstrate the required consideration by the trial court, appellate review of the sentence is purely de novo. *Ashby*, 823 S.W.2d at 169.

In making its sentencing determination in the present case, the trial court, at the conclusion of the sentencing hearing, was obliged to determine the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the guilty plea and sentencing hearings, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant made in her behalf about sentencing, and (7) the potential for rehabilitation or treatment. T.C.A. § 40-35-210(a), (b) (2003); *id.* § 40-35-103(5); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

A defendant who is an "especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." T.C.A. § 40-35-102(6) (2003). A defendant's potential for rehabilitation or lack thereof should be examined when determining if an alternative sentence is appropriate. *Id.* § 40-35-103(5). Sentencing issues are to be determined by the facts and circumstances made known in each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

The defendant was statutorily eligible for probation. *See* T.C.A. § 40-35-303(a) (2003). The determination of entitlement to full probation, however, necessarily requires a separate inquiry from that of determining whether a defendant is entitled to a less beneficent alternative sentence. *See State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000). A defendant is required to establish her "suitability for full probation as distinguished from his favorable candidacy for alternative sentencing in general." *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see* T.C.A. § 40-35-303(b); *Bingham*, 910 S.W.2d at 455-56. A defendant seeking full probation bears the burden of showing that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990) (quoting *Hooper v. State*, 297 S.W.2d 78, 81 (1956)), *overruled on other grounds by Hooper*, 29 S.W.3d at 9-10.

In the present case, the record does not reflect that the trial court engaged in a review of the relevant sentencing principles and considerations. Accordingly, we do not apply the presumption of correctness to the court's denial of probation.

That said, however, the record supports the denial of an alternative sentence. The presumption of favorable candidacy for alternative sentencing may be overcome, *inter alia*, by a defendant's long history of criminal conduct or by the recent or frequent but unsuccessful application of corrective measures less restrictive than confinement. T.C.A. § 40-35-103(1)(A), (C). Essentially, the trial court applied both factors, and the record supports both. The defendant committed embezzlement-type thefts in three states over a period of at least four years, establishing a long history of criminal conduct. We note that the defendant began her embezzlement from TQA in Tennessee almost *immediately* after leaving behind a wake of embezzlement in Nevada. The presentence report showed – and the defendant, in her brief, acknowledged – that her Kentucky probation had been revoked, showing a recent failure of a sentencing alternative. Thus, the record supports the denial of any alternative sentencing.

Based upon the record and our de novo review, we affirm the judgment of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE